DEC 13

No. 10-341

In the Supreme Court of the United States

PRECISION PINE & TIMBER, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals erred in concluding that the government did not breach petitioner's timber-sale contracts.

2. Whether the court of appeals abused its discretion in directing the entry of judgment for the United States with respect to contracts where no breach was established.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 596 F.3d 817. The opinion of the Court of Federal Claims (Pet. App. 36a-135a) is reported at 50 Fed. Cl. 35.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2010. A petition for rehearing was denied on June 10, 2010 (Pet. App. 136a-137a). The petition for a writ of certiorari was filed on September 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1991 and 1995, the United States Forest Service awarded petitioner fourteen contracts to cut and remove timber from national forests. Pet. App. 5a. With one exception—the Hay timber-sale contract—each of the contracts contained a clause, known as CT 6.01, under which petitioner agreed to suspend operations, upon written request of the Forest Service, in order to comply with a court order. *Id.* at 5a, 19a-20a. Those contracts provided that, in the event of such a suspension, petitioner's "sole and exclusive remedy" would be an adjustment of the contract term and recovery of out-of-pocket costs. *Id.* at 20a.

In April 1993, the Mexican spotted owl was listed as a threatened species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* Pet. App. 5a. Several environmental groups subsequently filed suit to enjoin timber harvesting in Arizona and New Mexico. *Id.* at 7a. They alleged that timber harvesting under existing Forest Service Land and Resource Management Plans (LRMPs), which had not been re-submitted for consultation with the Fish and Wildlife Service (FWS) after the listing of the Mexican spotted owl, violated the ESA. *Silver* v. *Babbit*, 924 F. Supp. 976, 992 (D. Ariz. 1995). The Forest Service maintained that the statute required no further consultation about existing LRMPs because those LRMPs had already been the subject of formal consultation, albeit before the listing of the Mexican spotted owl. Pet. App. 6a-7a. On August 25, 1995, the district court in the ESA suit ruled in favor of the plaintiffs, enjoined timber harvesting in Arizona and New Mexico, and ordered the Forest Service to commence consultation on existing LRMPs. *Id.* at 8a.

The Forest Service directed petitioner to suspend timber harvesting in order to comply with the court's order, and within two weeks, it requested that the FWS begin consultation about the effect of existing LRMPs on the Mexican spotted owl. Pet. App. 9a, 63a. In October 1995, as the result of a stipulation between the United States and the environmental plaintiffs, petitioner was allowed to restart harvesting on three of its contracts. *Id.* at 65a-66a. On December 4, 1996, the district court in the ESA suit concluded that consultations were complete and dissolved the injunction. *Id.* at 9a, 76a. The Forest Service immediately lifted the suspension of the remainder of petitioner's contracts. *Id.* at 76a-77a.

2. Petitioner submitted claims under the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, for contract-term adjustments and damages of approximately $13 million. Pet. App. 9a, 77a. Forest Service contracting officers granted the requested term adjustments and awarded $18,242 in out-of-pocket costs. *Id.* at 9a. The contracting officers denied the balance of petitioner's claims for lost profits and consequential damages. *Ibid*

Petitioner then filed suit in the Court of Federal Claims (CFC). Pet. App. 9a. Petitioner alleged that the suspension of its contracts breached an express warranty and the implied duty of good faith and fair dealing. *Id.* at 9a-10a. On cross-motions for summary judgment, the CFC found two breaches: (1) a breach of warranty with respect to seven contracts, and (2) a breach of the duty of good faith and fair dealing with respect to 11 contracts. *Id.* at 10a. After a trial on damages, the court entered judgment for petitioner in the amount of $3,343,712. *Id.* at 11a.

3. The court of appeals reversed. Pet. App. 1a-35a. The government conceded that it had breached the Hay

timber-sale contract, which did not contain clause CT 6.01. *Id.* at 4a. With respect to the other thirteen contracts, however, the court of appeals held that petitioner's contracts contained no express warranty that the Forest Service had complied with the ESA. *Id.* at 19a. It further held that clause CT 6.01 authorized the suspension of timber harvesting in order to comply with a court order, and that the suspension therefore was not a breach of contract. *Id.* at 19a-21a. The court also determined that the Forest Service had not breached its duty of good faith and fair dealing "because uninterrupted contract performance following an ESA listing decision was not a 'benefit' guaranteed by the contracts." *Id.* at 25a. The court remanded with instructions for the CFC to enter judgment in favor of the United States with respect to those contracts that were not breached, and to "award damages * * * consistent with this opinion" with respect to the Hay contract. *Id.* at 34a-35a.

ARGUMENT

Petitioner contends (Pet. 10-35) that the Forest Service violated the terms of its contracts and breached the implied duty of good faith and fair dealing. The court of appeals correctly rejected those claims, and its fact-bound conclusions about the proper interpretation of the particular contracts at issue does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 10-19) that the court of appeals erroneously created a government contract defense adapted from the sovereign-acts doctrine. That is incorrect. Under the sovereign-acts doctrine, "[w]hatever acts the government may do, be they legislative or

executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." *United States* v. *Winstar Corp.*, 518 U.S. 839, 891 (1996) (plurality opinion) (quoting *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)). The sovereign-acts doctrine has no relevance here because the court of appeals in this case did not address it, much less establish a new defense based upon it.

Petitioner points out (Pet. 12-13) that the court of appeals cited two decisions—*Centex Corporation* v. *United States*, 395 F.3d 1283 (Fed. Cir. 2005), and *First Nationwide Bank* v. *United States*, 431 F.3d 1342 (Fed. Cir. 2005)—that rejected a sovereign-acts defense. But the court cited those cases merely as "examples" of circumstances in which the government engaged in a "bait-and-switch" that violated its duty of good faith and fair dealing. Pet. App. 22a-23a. Although *Centex* and *First Nationwide Bank* also happened to address the sovereign-acts doctrine, the court did not rely on them for any proposition relating to that doctrine, which was not invoked by the government. Petitioner's arguments about the sovereign-acts doctrine therefore provide no basis for this Court's review.

2. Petitioner next argues (Pet. 20-24) that the court of appeals failed to apply its own decision in *Scott Timber Co.* v. *United States*, 333 F.3d 1358 (Fed. Cir. 2003). Any inconsistency between decisions of the Federal Circuit would not be a basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, the decision below does not conflict with *Scott Timber*. See Pet. App. 17a ("Our conclusion is consistent with this court's decision in *Scott Timber Co.* v. *United States*, which similarly concerned the govern-

ment's obligations arising out of timber contracts between the Forest Service and a private party."); see also *id.* at 21a. In both *Scott Timber* and the decision below, the court of appeals held that contract clause CT 6.01 authorized the Forest Service to "unilaterally suspend" timber harvesting to comply with a court order. *Ibid.* (quoting *Scott Timber*, 333 F.3d at 1366). That is precisely what happened here.

Petitioner points (Pet. 22) to the *Scott Timber* court's statement that a suspension must be "reasonable" in duration. The decision below is consistent with that principle. The Forest Service suspended petitioner's timber contracts on August 25, 1995, in order to comply with the district court's injunction. Pet. App. 8a, 63a. When the injunction was dissolved on December 4, 1996, the Forest Service immediately lifted the suspensions. *Id.* at 9a, 76a-77a. At all times, the suspensions were necessary to comply with the district court's order and, therefore, were contractually authorized. *Id.* at 21a; *Scott Timber*, 333 F.3d at 1366.

Petitioner also contends (Pet. 26) that the court of appeals committed "a vast departure from accepted common law standards" governing the implied duty of good faith and fair dealing. That argument lacks merit. A precise definition of good faith and fair dealing has proved elusive, see, *e.g.*, *Market St. Assocs. L.P.* v. *Frey*, 941 F.2d 588, 593 (7th Cir. 1991) (Posner, J.) (noting that "cases are cryptic as to its meaning though emphatic about its existence"), and the requirements of good faith and fair dealing depend on context, see *Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1032 (8th Cir. 2010). In this case, the court of appeals accepted petitioner's factual allegations, Pet. App. 21a-22a, evaluated those allegations in light of the terms and context of the

parties' contracts, and concluded that petitioner had failed to establish a breach of the duty of good faith and fair dealing. It noted that the "benefit Precision Pine bargained for was the right to harvest timber in a certain place, at a certain time," but that "the contracts expressly qualified that benefit." *Id.* at 25a. In particular, the "contracts did not promise or guarantee uninterrupted performance following a listing decision," and in fact they "expressly contemplate and allow the Forest Service to interfere with Precision Pine's performance." *Id.* at 26a. Emphasizing that "[t]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions," the court noted that "one 'benefit' the parties did not contemplate, and which [petitioner] is thus not entitled to under the contracts, is the guarantee of uninterrupted performance." *Ibid.* Petitioner identifies no case that suggests that the court's decision conflicts with the "accepted common law standards" of good faith and fair dealing that apply in any other circuit.

3. Petitioner further argues (Pet. 32-35) that the court of appeals should have remanded the case to the CFC to allow that court to determine whether the government had breached the implied duty of good faith and fair dealing. The court of appeals determined, as a matter of law, that even accepting petitioner's factual allegations, no breach of that duty had occurred. Pet. App. 19a-26a. The court therefore did not abuse its discretion in declining to order a remand, nor would that

case-specific issue warrant this Court's review in any event.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* *Amici* Federal Timber Purchasers, et al., assert (Br. 7) that the decision below will result in lower prices and reduced competition for future timber sales because it grants the Forest Service "almost total immunity" for suspensions that result from environmental litigation. That argument overlooks that the court of appeals simply gave effect to the plain language of petitioner's contracts, which expressly allocated the risk of any disruption that such litigation might cause. Pet. App. 19a-21a (applying CT 6.01). In any event, the suggestion that the decision below represents a dramatic change is unfounded. Clause CT 6.01 has been in use for nearly 20 years, *id.* at 5a, 41a, and the Federal Circuit previously applied it in *Scott Timber*, see 333 F.3d at 1366. The decision below properly respects and enforces the bargains struck between petitioner and the Forest Service.